United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1554 B

To be argued by
J. LAWRENCE SILVERMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1554

P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

MICHAEL PATERNO, GEORGE DENTI
and PATERNO and SONS, INC.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Michael Paterno, George Denti and Paterno & Sons, Inc. appeal from a judgment of conviction entered on February 22, 1974, in the United States District Court for the Southern District of New York after a 12 day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 73 Cr. 419, in nine counts, was filed on May 3, 1973. Count one charged Paterno, Denti and Paterno & Sons, Inc. with conspiring to evade the corporate income taxes of the corporate defendant for each of its fiscal years from 1965 to 1970 in violation of Title 18, United States Code, Section 371. Counts two through five charged Paterno, Denti and Paterno & Sons, Inc. with having attempted to evade the corporate defendant's income taxes from 1966 through 1970 in violation of Title 26, United States Code, Section 7201. Counts six through

eight charged Paterno and Count nine charged Denti with subscribing the false income tax returns of the corporate defendant for the same fiscal years as those in Counts two through five, in violation of Title 26, United States Code, Section 7206(1).

Trial of the three defendants commenced on February 6, 1974. On February 22, 1974, the jury found all of the defendants guilty on all counts in the indictment.

On April 10, 1974, Judge Frankel sentenced Paterno to concurrent nine month terms of imprisonment and a total fine of $20,000. Denti was also sentenced to concurrent nine month terms of imprisonment as well as a total fine of $10,000. The corporation, Paterno & Sons, Inc., was fined a total of $25,000.

Paterno and Denti have been released on bond pending appeal.

Statement of Facts

The Government's Case

The Government proved at trial that more than $145,000 in checks issued by Paterno and Sons, Inc., were cashed and then fraudulently claimed as trucking expenses on Paterno's corporate income tax returns over a four year period so as to reduce the corporation's legitimate tax liability by over $70,000. While the proof did not show the true reason for the payments, it was established that the persons whose names were on the checks as payees and whose names appeared on invoices purporting to show trucking services rendered to Paterno & Sons, Inc., were fictitious.

1. Background

Throughout the years in question Michael Paterno was the president, sole stockholder and active participant in the operation of Paterno & Sons, Inc., a large sewer con-

struction company which derived its income principally from business conducted with the City of New York and other municipalities (1079-1082, 1148-1195a, 1210a, 1361-1417a). George Denti was the secretary-treasurer of the corporation and its office manager (623a, 1079-1084a; GX 99-104).*

The corporate income tax returns were prepared directly from the records of the corporation by Jacob Bressler, a Certified Public Accountant (139-150a). Those records showed, over a four year period, truck rental expenses of approximately $320,000 of which $148,297.82 represented 48 payments by check to five persons (John Aurrichio, Arthur Lazravitch, Anthony Ferrotta, Thomas Tuccella and Michael Catenzaro). Supporting these payments in the corporation records were invoices from these five payees for work performed in supplying trucks and trucking services in connection with hauling earth from excavation projects at five different job sites. As a result of taking a trucking expense deduction for these 48 payments, the corporation's legitimate income tax liability was reduced by $74,112.18 (GX 1-48, 1-12A, 14-34A, 36-37A, 165).

2. Proof of Fraud

An investigation of the corporation's support for these deductions established that the addresses and telephone numbers on the invoices which substantiated the expenses were fictitious and that the five payees simply did not exist (210-215a, 364-392a; GX 79).

Internal Revenue Agent Anthony Rizzo commenced an "in-depth" tax audit of Paterno & Sons, Inc. in December, 1970 (191a). After meeting with Paterno, Denti and

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* "a" refers to the Trial Transcript as reproduced in the Joint Appendix.

"GX" refers to Government Exhibits at trial. "DX" refers to Defense Exhibits at trial.

the corporation's accountant and conducting a preliminary examination to verify the reported income, Rizzo examined the cancelled corporate checks which were provided as substantiation for the expenses listed on the corporate tax returns. He discovered forty-eight checks, totalling $148,297.82 and in amounts ranging from $1,436.86 to $9,167.60, and payable to five persons (Aurrichio, Lazravitch, Ferrotta, Tuccella and Catenzaro) that had not been deposited into an account belonging to these "truckers" but rather had been cashed at the Paterno & Sons' own bank, the Royal National Bank or at a bar (GX 1-48). Rizzo then asked Denti to provide the invoices that would support these disbursements and the current addresses of the five payees (206-209a). Denti did so, providing Rizzo with photostatic copies of 45 typed invoices on printed letterheads and a handwritten list of three of the payees and their current addresses (GXs 1-12A, 14-34A, and 36-47A and 149).

Rizzo, in attempting to locate the five payees, discovered that four of the five addresses on the invoices and handwritten list were non-existent and that the payee had never been present at the fifth address. These facts were confirmed by postal employees (364-392a). Moreover, telephone records showed that the telephone number on the printed invoices of three of the payees belonged to other individuals and that the telephone numbers of the remaining two payees were not held by anyone during this period (GX 79). Witnesses from several Federal and State agencies and two labor unions established that none of the five payees (a) had filed individual or business tax returns with the Federal Government or State of New York (109-124a, 784-789a), (b) had been issued New York State Driver's or Chauffeur Licenses (823-827a), (c) were members of the Union or paid benefits to it on behalf of employees (793-802a, 993-1004a) and (d) had been covered by workmen's compensation insurance in New York State (609-613a). Finally, the typewriter used in preparing six invoices from two different payees was found to be the same (GX 1-4A, 14A, 15A).

Thirty-nine of the forty-eight checks were cashed at the Royal National Bank where the corporation maintained its account (580-598a, 1057-1074a). While bank procedures required a bank officer to obtain identification from a payee before permitting a check in excess of $100 to be cashed, this policy was not followed with regard to the thirty-nine checks. Instead, Denti telephoned the bank official in charge and authorized him to cash the check (343-353a, 397-400). These thirty-nine checks were the only Paterno & Sons corporate checks ever cashed in this manner (355a, 403a, 563a).

The owner of a bar and grill in Manhattan testified that he cashed the nine remaining checks payable to three of the five payees, but was unable to recall the identity of the payees (599-606a; GX 24, 26, 36, 38, 39, 41-43, 45).

Further proof that these the payees were fictitious and the trucking expenses phony came from two engineers who had supervised and inspected construction work on behalf of the municipalities at two of the job sites. They established that no work at all was performed on certain days at one job site although invoices from two of the payees had been submitted for trucking services performed at that time (1161-1164a; GX 23A, 44A, 100, 103, 121-122). Similarly, at another location, invoices were filed by three of the payees for work performed that could not have taken place (1364-1378a; GX 124-127, 130-139, 28A 40A, 47A). Finally, on a third occasion, more trucks were supplied by three of the payees according to their invoices then the engineer's records and Paterno's own documentation showed were present at the site (1378-1381a; GX 140-143, 161, 18-19A, 25A, 37A, 38A).

The owners of four legitimate trucking companies that had performed hauling services for the corporation at the five job sites covered by invoices from the fictitious payees and who had themselves hired others to provide certain trucking services, had not hired or, indeed, ever heard of the five fictitious truckers (468-469a, 521-522a, 544-546a,

628-630a). James O'Reilly, employed by the corporation as a superintendent, testified under a grant of immunity that he had never heard of the five truckers (1238a, 1243a).

3. Paterno and Denti—Knowledge of the Fraud

Paterno, as president and sole owner of the Company, was in complete charge of its operation. He prepared the bids and estimates submitted by the corporation for its jobs, negotiated directly with the contractors for the company and the municipalities that hired the company, and spent a good portion of the day inspecting the sites of the jobs. He was also in complete charge of the fiscal affairs of the company and signed almost all of its expense checks (1079-1082a, 1090-1094a, 1210a, GX 1-48).

Paterno generally determined, from a monthly list of outstanding bills, those which would be paid (691-692a, 1090-1094a). Checks would never be signed by him unless he first was shown an invoice and substantiation for the amounts on the invoice (756a, 1031-1034a, 1123a). In the case of the trucking services which were the basis for the issuance of 48 checks to the five fictitious payees, the required substantiation was normally a delivery receipt, a document prepared on a daily basis by the trucker for each truck he was supplying to Paterno and signed by an employee of Paterno at the job site to confirm the truck's presence (1214-1217a). No delivery receipts from any of the five fictitious payees were ever introduced into evidence at the trial and were never provided to the Government in response to its subpoena.*

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* There was testimony from three of the office personnel that Paterno required this proper back up material before he would sign a check. One of these people, Mrs. Altro, also testified that there were occasions when checks would be signed without the delivery receipt but in all of these cases Denti told her that he would personally explain the lack of a document to Paterno. She also testified that delivery receipts were not destroyed (711-712a, 1104-1106a).

The payments to the five fictitious payees for trucking services were substantial, exceeding the payments made to the large number of legitimate truckers (GX 173). In fact, the largest single payment in each year for trucking expenses went to a fictitious payee. Moreover, while truckers were normally paid within weeks of the receipt of an invoice because the trucker had to pay his own employees, the payment to the fictitious payees often took place many months after the receipt of the invoice (714-715a, 1093-1096a).*

George Denti, secretary-treasurer of the company and the supervisor of the employees in the Paterno office, was found to have endorsed the names of the fictitious payees on the back of 5 checks (840-849a, GX 1, 3, 13-14, 31). These 5 checks, as well as the 34 others, were cashed at the Royal National Bank by unidentified persons without any display of identification. This was in violation of the bank's own rules and was done only after Denti called the bank to approve the cashing of the checks (343-353a, 397-400a).

Both Denti and Paterno insisted at various times and to various individuals that the five payees were legitimte truckers (357-358a, 406-409a, 1112-1113a, 1135-1137a, 1266-1269a). And in one instance, Denti, in testimony before the IRS, asserted that it was either La Spina or Minichino, both legitimate truckers, or O'Reilly, a Paterno employee, who had hired two of the fictitious payees (1143-1148a). But each of these men denied they had ever heard of the payees (544-546a, 628-630a, 1269a).

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* For example, two checks to Ferrotta, totalling over $5,500, were dated and cashed 8 and 10 months after receipt of the invoices (GX 24 and 26). In all, 20 of the 48 checks, totalling $73,239.14 were cashed more than 3 months after the receipt of the applicable invoices.

The Defense Case

Neither Paterno nor Denti testified in his own behalf. Various character witnesses were called by each defendant. In addition, Daniel J. O'Connell, a civil engineer, was called to estimate the amount of earth that had to be removed from the various sites, the number of truckloads that would be needed for such work and the cost of such a movement of earth. Because of the variables involved and the inherent unreliability of this type of analysis on the facts in this case, the Court did not permit any testimony as to estimates of the total cost of moving the earth (1580-1587a).

ARGUMENT

POINT I

The Evidence of Paterno's Guilt Was More Than Sufficient to Sustain The Jury's Verdict.

Paterno, but not Denti, argues that there was insufficient evidence to prove that he knew the payees on the 48 checks were fictitious and that the part of the tax returns which included a deduction for those checks was fraudulent.*

But this argument ignores the substantial evidence of Paterno's controlling role in the corporation, the substantial amounts involved in the payments to the phony truckers, the irregularities in Paterno's normal business operation in the processing and payment of the bills from the fictitious persons, and, finally, Paterno's false statements.

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* Paterno apparently concedes, as the evidence overwhelmingly shows, that the deductions taken on the tax returns were false and in as much as they were based on the forty-eight checks payable to fictitious persons which were carried on the books and records of the corporation as a trucking expense.

Viewing the evidence in the light most favorable to the Government, the jury was certainly warranted in concluding that Paterno was effectively in charge of the company and knew all of the details of its operation. Not only was he the sole stockholder of the corporation and its president but he actively participated in the estimating, bidding and negotiation processes by which the company obtained its business and hired the contractors and subcontractors who actually performed the work. Indeed, he inspected the work being performed on various job sites by spending almost one-half of his working time in the field (1079-1082a). Of particular importance, Paterno actively controlled the process by which bills were paid at the corporation. He reviewed and checked all bills and demanded full supporting documentation before he would approve their payment. He signed almost all of the expense checks issued by the corporation, including forty-six of the forty-eight to fictitious payees here. He also decided, in the course of reviewing the outstanding bills each month to the corporation, which would be paid and which would not (691-692a, 756a, 1031-1034a, 1090-1094a, 1123a).

In light of this complete control of the company's business and particularly its bill-paying process, Paterno's treatment of the invoices from the five fictitious truckers demonstrates his guilty knowledge. The aggregate amount of these invoices each year exceeded the cost of the trucking expenses rendered by the legitimate truckers who did work on these jobs (GX 173). In fact, in each year, the largest payments for trucking services went to the fictitious payees. And, of greatest significance, the amounts of the individual invoices for services from the fictitious truckers far exceeded the amounts on the invoices from the legitimate truckers. For example, the average invoice from a legitimate trucker during the four years was less than $400 whereas it was approximately $3,000 for the phony truckers.

Not only were the amounts of the invoices from these fictitious truckers substantially larger than those from

legitimate companies, but the time of payment was radically different. The normal procedure was for Paterno to pay a legitimate trucker within weeks after the receipt of his invoice (714a-715a, 1093a-1096a). This was essential since the truckers had to pay his own employees for their wages and required a prompt payment from Paterno (1090a-1096a). But in the case of the fictitious payees, payment was often over three months after receipt of the invoices, and in some cases as much as 8 or 10 months later.* The jury could certainly find that Paterno knew the checks he was signing were not for trucking services when the amounts were so substantial and the time gap so great.

Additional proof that the payments to the fictitious truckers was handled differently from that of legitimate persons came from evidence of the staples. One of the bookkeepers testified that a delivery receipt was almost always stapled to the invoice and that without such a delivery receipt Paterno would not approve the payments and sign the checks.** Thus, there was a staple mark in every one of the Paterno invoices from legitimate truckers in evidence

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* Truckers who had not been paid promptly often called the Paterno offices seeking their money. At those times Paterno or Denti would be told of the call and a check would often be sent. None of the fictitious truckers called the offices and thus, despite the substantial time gap, neither Paterno or Denti was informed of the complaint that would have had to be heard from a legitimate party (1107-1108a).

** There were two exceptions to this practice. According to one bookkeeper, at times there were no delivery receipts and Denti claimed he would explain the matter to Paterno personally to get the checks signed. At other times, a cost sheet (summary of all equipment received or rented at the job site on a particular day prepared by the superintendent at the job site) would be used to verify the invoice in lieu of the delivery receipt. But James O'Reilly, the superintendent, testified he had never entered the names of the fictitious payees on a cost sheet (689-692a, 1098-1099a).

at the trial * while such a staple mark was not present on over 80% of the invoices for the fictitious payees (779a, 783a).** Since the delivery receipts from the five payees were never produced by the defendant despite subpoena and court order, this evidence of the lack of staple marks on the invoices from the five payees allowed the jury to conclude that they never existed and that Paterno was not following his own practice in paying trucking expenses but was making payments to unknown third persons for unknown reasons.***

Finally, the normal procedures for delivering these checks were not followed. After Paterno had signed a check in payment of an invoice, it would be handed to an office worker who mailed it to the trucker (1110-1111a). But here the checks to the fictitious payees could not have been mailed because the addresses did not exist. In addition, at least fourteen of the checks cashed at the Royal National Bank were brought there on the day of their issuance or the next day. While the office employees recalled certain truckers who did pick up their checks, they were certain that none of these five had ever done so. From these facts the jury could find that Paterno did not turn the checks over to his employees for mailing in the regular course but rather directed them to a third person who he knew was not a trucker so they could be cashed.

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* Defendants argue that there were no staple marks in the invoices from Cross County Trucking Co. to Paterno. But those were that trucking company's own file copies of the invoices—not the records of Paterno (516-517a; GX 105-107).

** Paterno argues that only Mrs. Altro testified that she attached the delivery receipts to the invoices with staples. However, the invoices in evidence that had the staple holes all came from the period of time prior to Mrs. Altro's employment. Mrs. Ferraro, who was present at the earlier time, did not specify how the delivery receipt was attached to the invoice (DX XI-XII).

*** The delivery receipt would have required the signature of a Paterno employee at the job site, which was obviously an impossibility since these fictitious truckers were never there (1215a).

In light of all these factors, Paterno's assertions to his employees and his banker that the five truckers were real companies who had been paid for legitimate services were false statements demonstrating his consciousness of guilt.* This is especially so since the assertion to Ferraro, O'Reilly and Andretta occurred in late 1972 or early 1973 after Paterno knew of the IRS investigation and when he also knew that, on his own books, and particularly in the monthly recapitulation of outstanding bills, two of the fictitious payees had invoices outstanding since 1969 for over $6,400 which had never been paid (GX 210-212). If Paterno believed the two payees were legitimate, surely those bills would have been paid. In addition, although the payments to the fictitious payees first started in 1965, the last invoice received from any of the fictitious payees was in December 1970, the same month that Revenue Agent Rizzo began his audit, and the last payment made on these invoices was in April 1971, only days before Rizzo advised that he was going to check on the five fictitious truckers (GX 200-209).

Based on this extensive circumstantial evidence of Paterno's knowledge and his participation in the fraud and coupled with his own false statements, the jury's verdict was appropriate and fully supported by the proof.

* Furthermore, Paterno's silence in a meeting he had with Andretta, the banker from Royal National Bank, and Denti when Andretta stated that Denti had arranged the cashing of the checks to unidentified persons in violation of bank procedure indicates his prior knowledge that the payees were fictitious and that Denti had actively played a role in handling the payment to third persons (405-406a).

POINT II

The Trial Court Did Not Misstate The Issues In The Case And Did Not Improperly Exclude Expert Testimony.

The Government's case rested on proof of the basic fact that persons who had received 48 checks totalling over $145,000 were fictitious and that the corporation's books and records which showed these payments as trucking expenses were thus a cover-up to disguise the real non-deductible nature of the payments. This basic theory of the case was outlined by the prosecutor in his opening statement to the jury. In their openings, counsel for the defendants did not contest that this was a key factual issue for the jury. Nor did they talk about the theory they developed later at trial that the $145,000 was legitimately expended for trucking services, albeit paid to persons not listed on the books and records of the corporation, and that the fact of the expenditure would be proven by testimony from an expert of the estimated cost of hauling earth from the various job sites.

Counsel on appeal * now argues that Judge Frankel committed reversible error when he stated on one occasion in front of the jury during the trial that the main factual issue in the case was whether the Government could prove the five payees were fictitious. But this was an accurate statement by the judge of the issue in the case at that time since defense counsel had not articulated their theory that an expert would estimate that the cost of doing the work on these job sites included the $145,000 paid to the fictitious truckers. In any event, this argument is frivolous since Judge Frankel excluded the expert's opinion on estimated costs and the case submitted to the jury did not contain any such evidence. The fundamental factual issue pre-

* The attorneys handling the appeal did not conduct the trial of the case.

sented to the jury was thus whether the payees on the forty eight checks were fictitious.*

Thus the defendants' claim of error really centers on Judge Frankel's exclusion of any estimates from Daniel J. O'Connell a professor of engineering, as to what the cost of removing earth *should* have been for three of the five jobs sites. But that decision was proper. The engineer's testimony could only be based on estimates of many variable factors, none of which had been established by facts in evidence.** Such testimony could also not

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* Judge Frankel did permit the jury to consider the defendant's contention that even if they found that the five payees were non-existent and that both defendants knew this fact, they should still consider whether the Government had to prove that the full amount of truck expenses deducted was not paid to some other unidentified trucker. But there was no evidence at all of any such additional payments and hence this position was flimsy at best. Indeed, defense counsel hardly referred to it at all in the course of their extended summations and, on appeal here, counsel concedes that the jury did not have the expert's opinion from which the defense could make that argument.

** Judge Frankel ruled on the admissibility of the expert's opinion in several places. The following passages demonstrate the basis for that exercise of his discretion:

"There are simply too many unjustifiable unknowns in this hypothetical to allow an expert to testify about it.

It appears from evidence in the record that the number of yards of earth involved need not have been estimated but probably, at least to some degree, would be knowable.

Passing that we have had testimony from people on the job from one or more truckers readily available from at least the job superintendent who instead of estimating and calculating could presumably tell us about the size of trucks and the number of loads and the number of hours.

We have had people here who themselves or through others could give us the actual conditions of driving a dump truck with respect to which, with all respect to him, I do not think this expert has qualified as an expert.

[Footnote continued on following page]

account at all for the absence from the corporation's records in evidence of any checks or trucking expense records in

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We have had people here who are really [sic] available who can tell us about the estimated running time, loading time, and other things not hypothetically but as actually experienced on these various jobs. I'll not allow Mr. O'Connell, with due regard for his expertise, to supply those premises as a basis for the estimate the defense wishes to elicit" (1570-1571a).

* * * * *

"You have a computation [sic] (corporation) that has filing cabinets filled with unprivileged records. It claims to have paid truckmen certain amounts of money and we are going to go around the barn making estimates of dirt and driving time for dump trucks and sizes of dump trucks and other things about which this expert may or may not be expert, all for the purpose of getting back to figures that so far as I am advised this corporation should have right in its filing cabinets. . . .

In addition, we have had truckmen here, we have had job superintendents, all of whom know about dirt and dump trucks and what they hire and what they didn't hire" (1580a).

* * * * *

"I am not going to let him estimate the truckloads and number of trips and all that when there were real, genuine, living, flesh-and-blood trucks about which you certainly know through your people, and they can come here—not the trucks but the people—to tell us what they know about it—how many round trips and how many days and how many trucks days and how many loads—I don't care whether he was there or not. I cannot give you estimates of how long it takes to go up and down the elevators in this building, although I have worked here for many years, and I do not feel he has established his expertise on that subject, among others. I do not think he is able to testify what size trucks were being used. I do not think he is able to testify in fact what the price of the trucks being used was in each instance.

"Now I am not going to let him add up those unknown numbers to come up with an allegedly known answer—and it is as simple as that" (1588a).

* * * * *

Thus far, having listened to the numerous rounds of his alleged expertise in the exercise of what I hope is an informed discretion I have concluded that these bottom line estimates he would give should not be permitted, that all of this by far passes the bounds of permissible expert testimony (1581a).

addition to those of the legitimate and fictitious truckers and could only have confused the jury by adding guesses and conjectures to an issue that should be resolved by checks, books and records, or direct testimony of actual work performed by the persons who did it or those who observed them doing it. As such, it was within the sound discretion of the Court to reject this testimony, the exercise of which normally will not be disturbed on appeal and certainly should not be in this case. *Nelson* v. *Brames,* 241 F.2d 256 (10th Cir. 1957).

POINT III

The Testimony Of The Handwriting Expert Was Properly Received In Evidence.

The Government proved at trial through the testimony of a handwriting expert, William Oberg of the FBI, that Denti had handwritten the names of the fictitious payees on the back of five of the forty-eight checks (GX, 1, 3, 13, 14, 33). Denti had endorsed three different names, John Aurrichio, Arthur Lazravitch and Thomas Tuccella on these checks. In rendering his opinion, Oberg had used handwriting exemplars in which Denti had admittedly written each of these names 10 different times, as well as the names of the other two payees 10 different times (GX 146-148). In addition, Oberg was provided with GX 149, a handprinted and handwritten list of the names and addresses of three of the five payees. Only one of these names, Thomas Tuccella, was that of a payee on the check which Oberg said bore Denti's handwriting and, on GX 149, that name had been handprinted and not handwritten.

Denti mounts a wholly frivolous attack on the admissability of the expert's opinions by claiming that GX 149 was not properly authenticated as being in the handwriting of Denti. This argument ignores the facts supporting the admissability and authentication of this one document as well as the wholly minimal place it had in Oberg's opinion.

GX 149 was a list of names and addresses of three of the five fictitious payees given to Revenue Agent Rizzo by Denti. Although Rizzo did not actually observe Denti write out GX 149, he had requested a list of the addresses of the payees from Denti and received it directly from him some thirty minutes after the request. It was introduced into evidence, without objection by the defense, during the Government's direct examination of Rizzo as part of the proof of Denti's role in the crime and not simply as a handwriting exemplar. While Oberg at no time was asked for an explicit opinion as to whether the author of the admitted exemplars GX 146 to 148 was the same person as the author of GX 149, it is clear that such a conclusion was implicit from his testimony. Oberg stated that he had examined GX 1-48, the checks, and GX 146-149 in his laboratory and had concluded that the "writer" of 146 through 149 had prepared five of the endorsements on the checks. Although Oberg had been furnished the four exhibits on the understanding that the same man had written them, it is ludicrous to assume that he would not have brought any question he had of a different author of 149 to the attention of the prosecutors before the trial or to the jury in his opinion. Indeed, he repeatedly referred to the single "writer" of GX 146-149 and, at one point, indicated more directly that each of the exemplars he used were written by the same man.*

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* "Q. Now, Mr. Oberg, am I correct in assuming that you do not say that in your opinion each and every one of the exemplars [sic] furnished you are identical copies of each other? A. That is correct.

Q. There are distinctions and dissimilarities, are there not? A. Well, there are different names on each and in the case of the one document, part of it is handprinted and part of it is handwritten.

Q. No, but, forget that. I am talking—just look at this first one here, the John—if you lay one, the top one over the fourth one, there would be some differences, would there not? A. Yes, sir.

Q. And that's true of almost anybody's handwriting, is it not? A. That's correct.

Q. The individual isn't a machine and doesn't produce the same target every time he or she writes? A. That's correct."

In any event, GX 149 played little if any role in the conclusions reached by Oberg. In setting forth on direct examination the basis for his opinion that Denti had endorsed the names on the five checks, Oberg made only three references to features found on GX 149 but referred to 33 features on GX 146-148. On cross-examination he made 83 references to GX 146-148 and only four to GX 149. The cursory treatment of GX 149 in Oberg's testimony is hardly surprising since none of the three payee's signatures he identified as having been written by Denti appear at all on GX 149. The only payee whose name did appear was Thomas Tuccella, but that name was printed and not written and thus, according to Oberg, of no value in his analysis. Indeed, the lack of importance of this exhibit as a basis for Oberg's conclusion that Denti wrote the endorsements is obvious both from the fact that GX 146-148 had ten admittedly genuine exemplars of Denti's writing of the identified names and by the total absence of any argument on the point in Denti's summation.*

POINT IV

The Defense Sought To Give The Jury The False Impression That Denti Had Nothing To Hide During The Audit And Thus Gave Rizzo Everything He Requested. The Government Was Thus Justified In Allowing The Jury To Know That Denti Had Hesitated Before He Provided Handwriting Exemplars.

During direct examination, Revenue Agent Rizzo testified that he had obtained handwriting exemplars from Denti on October 18, 1971. The prosecutor made no effort to elicit that this was one month after Denti had refused to turn over such exemplars. Then, on the cross-examination of Rizzo, defense counsel sought to elicit those facts which would create the impression that Denti had pro-

vided Rizzo with everything he sought during the audit and thus must be innocent of the charges because he had nothing to fear or hide from making a full disclosure to Rizzo: *

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* That this was the very point defense counsel wished to make is clear from the summations:

> "And would they not have gotten rid of all this, either using moving as an excuse or just that they were lost, or misplaced, and those things do happen in small companies and in big companies, and if they had done anything of that sort, who could have proven to the contrary?
>
> Just think about it.
>
> Are not their actions consistent with innocence? Are not their actions in having all of this available to the order of Mr. Rizzo, who came to the company to audit the books, and giving him open sesame, as he told you himself—was not all of this consistent with innocence? Was not all of this thing that anybody who had done no wrong would normally do?" (1705a)
>
> * * * * *
>
> "What is required is that you should analyse [sic] the situation, consider the evidence and consider what happened on the basis of the very first occasion, beginning with that when Mr. Rizzo presented himself at the offices of Paterno & Sons, Inc. and made it known that he was an Internal Revenue Agent about to conduct an in-depth audit. What was the response of those persons whom he met at Paterno & Sons?
>
> 'By all means, Mr. Rizzo. There is the space which contains all the records, all the books, everything that you want to see. Just ask for it. Help yourself. It is available to you.'
>
> Do you believe, any one of you, that persons or a person who had planned for years to work at a method to cheat the government, yours and mine and their own, if you please, of the just amount of taxes would respond in that way without hesitation, without any pressures?
>
> 'What do you want? Just ask for it, it is yours'" (1747-1748a).

"Q. Is it true that on every occasion that you went to the offices of Paterno & Sons, Inc. you were furnished by personnel of that corporated body any records that you requested for your in-depth examination? A. Yes, sir.

Q. Is it also true, Mr. Rizzo, that you were given free access to the safe in which the records of the company were kept? A. When I asked for, sir, if I may answer that, I have asked for the records, they said they were in the safe and the safe was open, and I was able to get the cash disbursements book and purchase journal, yes, sir.

Q. So that in fact, you were given free access to the safe to look at whatever records there were in the safe, isn't that correct A. Yes, sir.

Q. And that condiiton existed throughout the entire period of your visitation from the date when you first went there to the date that you were last there, isn't that so? A. Yes, sir.

Q. At no time did Mr. Michael Paterno or even George Denti refuse to furnish you with any records, isn't that correct? A. That is correct.

Q. And when you examined in the course of your in-depth audit for samples of their handwriting which had been received here in evidence, for example, with respect to Michael Paterno, Exhibits 154, 155, 153, 152 and 151, Mr. Paterno furnished you with those handwriting samples? A. He did.

Q. And when you asked for samples from Denti, Exhibits 146, 147 and 148, he likewise furnished those? A. That is correct" (244-246a).

On redirect examination, the prosecutor elicited those facts which would not permit a distorted picture to be presented to the jury—that Denti did refuse to provide exemplars on the first occasion they were requested. On recross-examination, defense counsel elicited the facts which showed Denti wanted to confer with his attorney prior to turning over the exemplars.

Denti now claims it was error for the prosecutor to point out that he had refused to turn over exemplars on the first occasion. But this argument simply ignores the reason the subject was raised on redirect examination—defense counsel's own successful attempt to create a misleading record more favorable to Denti than the facts warranted.* Surely the Government was entitled to make the record clear as to what Denti did do and did not do.**

Even had the prosecutor improperly sought to have the jury draw an adverse inference against Denti based on his refusal to provide handwriting exemplars until he had consulted with his attorney, such an error in the present case would have been harmless beyond a reasonable doubt. It was not the adverse inference from his initial refusal which damaged Denti. Indeed, the jury knew that Denti did in fact voluntarily provide the exemplars one month later. It was the adverse facts, that Denti had signed the endorsements on the phony checks and that he made arrangements at the Royal National Bank to facilitate the cashing of the checks, which did him in.

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* Defense counsel was fully aware of this first refusal at all times (323a, 331a).

** Denti seeks to convert this matter into one of constitutional dimension by alleging that the prosecutor violated his Fifth Amendment right to remain silent by questions relating to this one month delay in furnishing the exemplars. But since there is no constitutional right to refuse to provide handwriting samples, *Gilbert* v. *California*, 388 U.S. 263 (1967), a prosecutor's comments on the defendant's reluctance to do so cannot be attacked on that ground. Nor can Denti claim here, as he attempts to do, that the prosecutor sought to draw an inference against him because he consulted with an attorney. The prosecutor only brought out the fact of Denti's initial refusal—it was defense counsel who later elicited the testimony that it was Denti's desire to confer with his attorney.

POINT V

Defendants Were Not Entitled To An Administrative Conference With The IRS Before The Grand Jury Could Vote An Indictment.

The defendants argue that the indictment in this case must be dismissed because they did not have an administrative conference with officials of the IRS. This argument, rejected by Judge Frankel,* not only completely ignores the power of a Grand Jury to return an indictment for criminal conduct but rests upon a regulation of the IRS which was no longer in effect.

The grand jury has the broadest power to investigate all possible violations of the criminal law and to return an indictment when the evidence before it warrants such action. See e.g., *United States* v. *Bukowski,* 435 F.2d 1094 (7th Cir. 1970); *United States* v. *Tane,* 329 F.2d 848 (2d Cir. 1964). No authorities have been cited by the defendants which would invalidate a grand jury's action in a criminal tax case simply because a taxpayer defendant was not afforded a formal opportunity at a conference** to explain the facts to the IRS. Nor, in any other type of case, is there any authority that a potential defendant has the right to explain his conduct to an administrator, prosecutor, law enforcement official or even the grand jury itself before an indictment is returned against him. See *United States ex rel. McCann* v. *Thompson,* 144 F.2d 604 (2d Cir. 1944). Indeed, the authorities make clear that there is no such right to an administrative conference at the IRS before an indictment can be voted. *United States* v. *Daly,* 481 F.2d 28, 30-31 (8th Cir.), *cert. denied,* 414 U.S. 1064 (1973); *United States* v. *Goldstein,* 342 F. Supp. 661 (E.D.N.Y.

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* Judge Frankel did not write an opinion.

** Obviously the taxpayer defendant can explain the facts to the agents who conduct the audit and investigation.

1972); *United States* v. *Steinman*, S.D.N.Y. June 29, 1973, 73 Cr. 216 (Tyler, *J.*). See *Luhring* v. *Glotzbach*, 304 F.2d 560 (4th Cir. 1963). Finally, not only may a grand jury proceed independently of prior administrative action, it may explicitly use evidence obtained by an investigatory agency in derogation of a suspects substantive constitutional rights. *United States* v. *Calandra*, 414 U.S. 338, 350 (1974); *United States* v. *Dorman*, 491 F.2d 473, 481 n. 15 (2d Cir. 1974). It clearly follows that it may indict a defendant without inquiring into whether an administrative agency has complied with technical procedures which are not constitutionally required and whose violation would not serve to enhance the Government's case or to preclude or impair a defense from being offered either before the grand jury itself or before a petit jury at trial.

In any event, the defendants' claim rests on provisions of the IRS regulations which they claim required that they be called to a conference at the Intelligence Division level before the matter is referred to the Regional Counsel's office, so they could explain their conduct.* But the right to such a conference was abolished on December 14, 1972.**

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* The defendants concede that they had no right pursuant to regulations to a conference at other levels of review of the recommendation that a taxpayer be prosecuted since the regulations governing those meetings make them completely discretionary with the Government. Although they suggest that there has been a general practice at the other levels of review for a potential criminal defendant to talk to the Government representatives, they do not claim that the absence of these meetings tainted the indictment since *Sullivan* v. *United States*, 348 U.S. 170 (1954), as the defendants recognize, precludes that position.

** The right to a conference was contained in a variety of I.R.S. regulations which govern its practices and procedures, e.g. Internal Revenue Manual P. 9-32 and Section 9355 of the manual, which are not available to the public, and 26 C.F.R. 601.107(2), which is available to the public. On December 14, 1972, the I.R.S. reversed its own regulations requiring such a conference in the following memorandum order:

[Footnote continued on following page]

CC:E-137 JWS December 14, 1972

TO: ALL REGIONAL COMMISSIONERS
ALL REGIONAL COUNSEL

FROM: JOHN F. HANLON, Assistant Commissioner
(Compliance)
LEE H. HENKEL, Chief Counsel

SUBJECT: *Formal Conferences in Criminal Tax Cases*

In furtherance of our major objective to reduce the lapsed time between the investigation and the litigation of criminal tax cases we have decided to eliminate the requirement for a formal interview with the principal in prosecution cases which have been held in the districts upon completion of the investigation. The principal will not be formally invited to attend a district conference. However, if towards the conclusion of an investigation, the taxpayer or his representative requests a meeting with district management officials, or if the Chief believes it will be in the best interest of the Service, a formal interview will be offered at a time and place convenient to the Service. We will continue to give the subject of a recommendation for prosecution every opportunity during the course of the investigation to explain his participation in the alleged criminal violation.

Effective immediately, the provisions of IRM 9355 are hereby revoked. The formal interview with the principal against whom a recommendation for prosecution may be made (IRM 9355.1) will no longer be offered as a matter of course.

The District Intelligence Offices must use their best judgment in deciding what information is to be furnished to the taxpayer during the investigation including the civil tax and penalties previously furnished at the formal interview (IRM 9355.3).

When the Chief, Intelligence Division, decides to recommend prosecution, he will prepare a letter notifying the principal that prosecution is being recommended and that the case is being referred to Regional Counsel.

* * * * *

s/ John F. Hanlon
s/ Lee H. Henkel

Thereafter, on April 12, 1973, the publicly available version of this I.R.S. regulation was amended to reflect the change. 26 C.F.R. 601.107(2).

As of that date, the requirement of a formal interview with the potential defendant was eliminated.*

CONCLUSION

The judgment of conviction should be affirmed.

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for the United States of America.

J. LAWRENCE SILVERMAN,
Special Attorney,
Joint Strike Force
for the Southern District of New York,

HOWARD WILSON,
S. ANDREW SCHAFFER,
Assistant United States Attorneys,
Of Counsel.

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* This case was referred to the Regional Counsel's office in April 1973.

AFFIDAVIT OF MAILING

State of New York)
County of New York)

J. LAWRENCE SILVERMAN,
deposes and says that he is employed in the office of the Joint Strike Force for the Southern District of New York.

That on the 11th day of July, 1974 he served a copy of the within Briefs by placing the same in a properly postpaid franked enveloped addressed:

Arthur Karger, Esq.
600 Madison Ave.
New York, N. Y. 10022

Louis Bender, Esq.
225 Broadway
New York, N. Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

J. Lawrence Silverman

Sworn to before me this
11 day of July, 1974

Carl M. Bornstein

CARL M. BORNSTEIN
Notary Public, State of New York
No. 31-0559568
Qualified in New York County
Commission Expires March 30, 1975